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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 415

FOREMAN'S ASSOCIATION OF AMERICA,
Petitioner,

vs.

EDWARD G. BUDD MANUFACTURING COMPANY AND NATIONAL LABOR RELATIONS BOARD,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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vs.

EDWARD G. BUDD MANUFACTURING COMPANY AND NATIONAL LABOR RELATIONS BOARD,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Foreman's Association of America, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered pursuant to remand from this Court, modifying a prior judgment of the Circuit Court of Appeals for the Sixth Circuit entered on June 3, 1947 and setting aside

Paragraphs 1(a), 1(b) and 2(c) of the order of the National Labor Relations Board of January 30, 1946 but leaving in force and effect the other provisions of the order as to which it had theretofore decreed enforcement.

Opinions Below

The decree of the court below entered June 3, 1947 without opinion appears at R. 321 and is reported at 162 F 2d 461. Its opinion dated August 16, 1948 appears at R. 322 and is reported at 169 F 2d 571. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 53-58, 31-47) are reported in 65 N. L. R. B. 612.

Jurisdiction

The decree of the court below (R. 321), enforcing in full the order of the Board, was entered on June 3, 1947. The order of this Court granting certiorari to a limited extent and remanding the cause to the court below for consideration of the effect of the Labor Management Relations Act of 1947 on the question to which the grant of certiorari was limited, was entered on December 15, 1947. The decree of the court below, pursuant to the remand of this Court, was entered on August 16, 1948, modifying and setting aside its prior decree of June 3, 1947. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, 28 U. S. C., Section 1254, and Section 262 of the Judicial Code, 28 U. S. C., Section 1651, and under Section 10(f) of the National Labor Relations Act, 29 U. S. C. 160(f).

Statutes Involved

The pertinent provisions of the National Labor Relations Act of 1935, 49 Stat. 449, 29 U. S. C. (1940 ed.) 151 *et seq.*; of the Labor Management Relations Act of 1947, Public Law 101, 80th Cong., 1st Sess. Chap. 120, (29 U. S. C.

(1947 ed.) 151 *et seq.*); of Section 2 of the Norris La Guardia Act (29 U. S. C. 102); and of Section 24(8) of the Judicial Code as amended (28 U. S. C. (1948 ed.), Section 1337) are set forth in the Appendix *infra* pp. 26-30.

Questions Presented

1. Were Petitioner, and the supervisor employees whom it represents, denied due process of law under the Fifth Amendment to the Constitution by reason of the holding of the court below that Sections 2(3), 2(11) and 14(a) of the Labor Management Relations Act of 1947 validly prohibits the enforcement of an order of cessation of unfair labor practices entered by the National Labor Relations Board and originally enforced by the court below under the National Labor Relations Act of 1935, where Sections 2(3), 2(11) and 14(a) of the Labor Management Relations Act of 1947 deprive supervisory employees of all existing remedies, national and local, before the Board, the courts, or otherwise, for employer violations of their constitutional rights to self-organization and to bargain collectively through representatives of their own choosing free from restraint or coercion, without providing any opportunity for the protection of that right, which neither Congress nor the courts have power to abridge or to destroy.

2. Were Petitioner, and the supervisory employees whom it represents, denied due process of law under the Fifth Amendment to the Constitution by reason of the holding of the court below that Sections 2(3), 2(11) and 14(a) of the Labor Management Relations Act of 1947 properly classify supervisory employees as representatives of management and validly deprive supervisory employees of the protection given by the act to other employees, where (a) such other employees include plant guards and professional employees who are similarly representative of management;

(b) management itself is granted the protection of the act in its selection of representatives for the purposes of collective bargaining; (c) other federal labor legislation provides protection for supervisory employees similarly situated, and (d) supervisory employees under the Labor Management Relations Act of 1947 are denied all remedies before the Board, the courts or otherwise under any law, national or local, relating to collective bargaining for the protection of the same rights which supervisory employees under other federal legislation and non-supervisory employees under this legislation are furnished protection.

Petitioner assigns as error by the court below negative answers to each of the foregoing questions.

Statement of Matters Involved

On January 3, 1947, the National Labor Relations Board (hereinafter referred to as the Board) issued its Decision and Order (R. 53, 31), finding, in pertinent part, that Foreman's Association of America Ch. 77 (hereinafter referred to as the Association) was a labor organization within the meaning of Section 2(5) of the National Labor Relations Act of 1935 (49 Stat. 449), and that the Edward G. Budd Manufacturing Company, (hereinafter referred to as the Company) had engaged in unfair labor practices within the meaning of Section 8(1) and 8(3) of the said Act by interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the said Act and by discriminating in regard to the hire and tenure of employment of a named foreman, thereby discouraging membership in the Association. The Board ordered the Company to:

> "Cease and desist from:
>
> "(a) Discouraging membership in the Foreman's Association of America by discharging, laying off or re-

fusing to transfer to production jobs any of its supervisory employees, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of their employment;

"(b) In any other manner, interfering with, restraining or coercing its supervisory employees in the exercise of the right to self-organization, to form, join, assist or bargain collectively through Foreman's Association of America and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act". (R. 55).

The Board also ordered the Company to offer reinstatement and back pay to the named foreman found to have been discriminated against and to post and maintain for sixty days at its plant notices embodying the terms of the Board's Order. (R. 55-58).

On June 3, 1947, relying on the authority of *Packard Motor Car Company* v. *National Labor Relations Board* 330 U. S. 485, the court below ruled that the supervisory employees and foremen of the Company were employees within the meaning of the National Labor Relations Act of 1935 and decreed enforcement in full of the order of the Board, (R. 321) *National Labor Relations Board* v. *Edward G. Budd Manufacturing Company* 162 F 2d 461 (C. C. A., 6th).

Thereafter on June 23, 1947, Congress enacted the Labor Management Relations Act of 1947, Public Law 101, 80th Congress 29 U. S. C. A. Section 151 *et seq.* effective August 22, 1947, amending the provisions of the National Labor Relations Act. In view of the changes in the law with respect to supervisory employees made by this Amendment, the Company petitioned this Court for a writ of certiorari. The Association petitioned for leave to intervene on the ground that the Amendment was unconstitutional, particularly in its provisions relating to supervisors. By order of December 15, 1947, this Court granted the petition to

intervene, granted certiorari "limited to the question of the validity of that part of the order of the National Labor Relations Board which directs petitioner to cease and desist from discouraging membership in the Foreman's Association of America" and remanded the cause to the court below "for consideration of the effect of the Labor Management Relations Act of 1947 . . . on the question to which the grant of certiorari was limited." *Edward G. Budd Manufacturing Co.* v. *National Labor Relations Board,* 332 U. S. 840.

On the remand to the court below, petitioner contended *inter alia* that Sections 2(3), 2(11) and 14(a) of the amended act relating to supervisors are unconstitutional because they deprive supervisors employed by employers subject to the amended act not merely of the protection of the amended act but of all remedies under any law, national or local, relating to collective bargaining for the redress of employer violations of rights secured by the First Amendment to the Constitution and guaranteed by Section 7 of the original, as well as of the amended act. The court below rejected this contention. It held that these rights, though long recognized, were protected by the Constitution against governmental infringement only; that the National Labor Relations Act created rights against employers which did not exist before, not as private rights vested in employees but as public rights protected by the power placed by the act in the Board; that nothing in the amended act interferes with the rights of supervisory employees guaranteed by the First Amendment; and that the amended act was merely a grant of statutory protection for the enforcement of those rights which Congress was privileged to change at a later time by withdrawal of that protection (R. 329). For reasons stated below, petitioner assigns this holding as error.

Petitioner also contended that Sections 2(3), 2(11) and 14(a) of the amended act are based upon an arbitrary classification with resulting discrimination against supervisory employees and so violate the Fifth Amendment of the Constitution. The Court below held the action of Congress in deciding as a matter of policy that in the enforcement of the National Labor Relations Act supervisory employees must be treated as either a part of management or as a part of the employees and in treating them as a part of management was based upon substantial and real considerations and was not an arbitrary or unjustifiable classification. (R. 330-331). For reasons stated below, petitioner assigns this holding as error.

Petitioner further contended in the court below that the cease and desist provisions of the Board's order and the correlative provisions requiring posting of notices should be enforced because the only barrier to their enforcement were the unconstitutional provisions of Sections 2(3), 2(11) and 14(a) of the amended act, in the absence of which the original Order of the Board as originally enforced by the court below is warranted by the provisions of the original and amended acts. The court below rejected this contention. It held that "Congress intended by the amendment of the Labor Management Relations Act that employers be free in the future to discharge supervisors for joining a union and to interfere with their union activities and that the cease and desist provisions of the Board's Order would enjoin the respondent from engaging in conduct in the future which is now lawful". (R. 233). For reasons stated below, petitioner assigns this holding as error.

Reasons for Granting the Writ

I. SECTIONS 2(3), 2(11) AND 14(a) OF THE AMENDED ACT DENY PETITIONER, AND THE SUPERVISORY EMPLOYEES WHOM IT REPRESENTS, DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION BECAUSE THEY

DEPRIVE SUCH EMPLOYEES OF ALL EXISTING REMEDIES IN ALL FEDERAL AGENCIES, INCLUDING THE DISTRICT COURTS, AND IN ALL STATE AND LOCAL AGENCIES, INCLUDING THE STATE LABOR RELATIONS BOARDS, FOR THE REDRESS OF EMPLOYER VIOLATIONS OF CONSTITUTIONAL RIGHTS WHICH NEITHER CONGRESS NOR THE COURTS HAVE POWER TO ABRIDGE OR DESTROY, AND NO REAL OPPORTUNITY EXISTS ELSEWHERE FOR THE PROTECTION OF THOSE RIGHTS.

This Court has recognized the general importance of the problem of supervisory employees, in connection with the administration of the National Labor Relations Act of 1935, with respect to the construction of Section 2(3) of that Act, defining "employee" (*Packard Motor Car Company* v. *National Labor Relations Board, supra*) and the paramount and exclusive jurisdiction of the Board, as against State Labor Relations Boards, over bargaining units of supervisory employees, (*Bethlehem Steel Company* v. *New York State Labor Relations Board* 330 U. S. 767 (1947)). This case raises the issue as to the constitutional validity of Sections 2(3), 2(11) and 14(a) of the amended act in depriving supervisory employees of existing remedies for employer violations of the fundamental rights guaranteed in Section 7 of that Act and other federal legislation, not only under the amended act, but under any law, national or local relating to collective bargaining. As we point out below, the deprivation in these and other sections of the amended act is complete. Jurisdiction to remedy violations of such rights by employers is withdrawn from the State Labor Relations Boards, even where the National Labor Relations Board is itself deprived of jurisdiction (cf. *Bethlehem Steel Company* v. *New York State Labor Relations Board, supra*) and from all courts, including the District Courts of the United States (cf. Section 24 (8), amended, of the Judicial Code, 28 U. S. C., Sec. 1337; *Texas & N. O. R. Co.* v. *Brotherhood of R. and S. S. Clerks* 281 U. S. 548) and other agencies

which would otherwise have such jurisdiction. Under these circumstances, the holding of the court below that the deprivation of all such remedies is constitutionally valid raises a federal question of general importance relating to the construction and application of the Constitution and federal statutes, which, we submit, does not give proper effect to applicable decisions of this Court and which has not been but should be, in the public interest, settled by this Court (see *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill* 281 U. S. 673 (1930); *Truax* v. *Corrigan* 257 U. S. 312 (1921)).

1. The right of employees to self-organization and to select representatives of their own choosing, for collective bargaining or other mutual aid or protection, without restraint or coercion, is a fundamental right, secured under the First and Fourteenth Amendments (*National Labor Relations Board* v. *Jones & Laughlin Steel Corporation,* 301 U. S. 1, 33-34; *American Steel Foundries* v. *Tri City Central Trades Council,* 257 U. S. 184, 209, 27 A. L. R. 360; *Texas & N. O. R. Co.* v. *Brotherhood of R. & S. S. Clerks,* 281 U. S. 548; *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U. S. 515; *Thomas* v. *Collins,* 323 U. S. 516; *Thornhill* v. *Alabama,* 310 U. S. 88; *Cafeteria Employees Union* v. *Angelos,* 320 U. S. 293; *Carlson* v. *California,* 310 U. S. 88; *Truax* v. *Raich,* 239 U. S. 33, 41). This right is declared and guaranteed as to employees by the amended act (Sections 1 and 7) and by other federal statutes (see Section 2 of the Norris La Guardia Act, 29 U. S. C. A. Section 102) Appendix pp. 26, 28, 29. The court below held that as to supervisory employees, nothing in the amended act had restricted these rights, but that the amended act had merely "changed the statutory method of enforcing those rights" (R. 329). The "change" in the method of statutory enforcement was to take away from supervisory employees the enforcement provisions of the original Act (R. 329) as well as remedies

against employers under any other similar law. (Section 14(a) of the amended act. App. p. 29.)

2. It has long been established that where there is a right, there is a remedy. *Marbury* v. *Madison,* 1 Cranch 137. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection . . . it is a general and indisputable rule, that where there is a legal right, there is a legal remedy by suit or action at law, whenever that right is invaded" (*ibid* 163). In *Texas & N. O. R. Co.* v. *Brotherhood of R. & S. S. Clerks, supra,* the Brotherhood brought suit in the District Court to restrain the Company from interfering with, restraining or coercing the Company's clerical employees in the matter of their organization and designation of representatives for the purposes set forth in the Railway Labor Act of 1926. That Act declared the rights of employees in language similar to that employed in Sections 1 and 7 of the amended Act, (Chap. 347, 44 Stat. at L. 577 U. S. C. Title 45, Section 152) and Section 2 of the Norris La Guardia Act (supra). The Railway Labor Act of 1926, however, provided no statutory method for the protection of these rights. In this respect, the amended Act, with respect to supervisory employees, is similar to the Railway Labor Act of 1926. Both declare and define fundamental rights of employees; neither provides any statutory method for the protection of such rights. In the *Texas* case, the District Court granted the injunction and on contempt proceedings in the exercise of equity powers required the Company to disestablish a company-dominated union, to reinstate the Brotherhood as the recognized representative of its clerical employees, and to reinstate without loss employees who had been discharged by the Company because of their activities on behalf of the Broth-

erhood (24 F. 2d 463; 25 F. 2d 873, 876). The Circuit Court of Appeals affirmed the decree (33 F. 2d 13). In affirming, this Court held "The absence of penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which no statutory penalties are provided. In the case of the statute in question, there is an absence of penalties, in the sense of specially prescribed punishment, with respect to arbitral awards and the prohibition in change of conditions pending the investigation and report of an emergency board, but in each instance, a legal obligation is created and the statutory requirements are susceptible of enforcement by proceedings appropriate to each. The same is true of the prohibition of interference or coercion in connection with the choice of representatives. *The right is created and the remedy exists.*" (281 U. S. 569-570 italics supplied) . . . "As the carriers have no constitutional right to interfere with the freedom of employees in making their selections, they cannot complain of the statute on constitutional grounds." (*ibid* 571) See *Virginian Ry. Co.* v. *System Federation No. 40, supra.*

Petitioner cited the *Texas* case in the court below in support of its contention that the same remedy in the District Courts would exist for the protection of the fundamental rights of supervisory employees as was afforded for the clerical employees under the similar provisions of the Railway Labor Act, but for the unconstitutional deprivation of such remedies by the amended act.

The court below, however, appears to have misunderstood our contentions in these respects. We do *not* urge that the protection afforded by the National Labor Relations Act is a constitutional right or that Congress may not withdraw the administrative and other remedies provided by that Act,

or that the Act creates vested rights in those remedies with respect to transactions in the future, or that the Act has created private vested rights of enforcement against employers, rather than public rights of enforcement, generally within the exclusive jurisdiction of the Board (R. 329). Our contentions are

(1) the right of all employees, including supervisory employees, to self-organization and to select representatives of their own choosing, without restraint or coercion, is a right secured by the First Amendment and guaranteed in the original and amended acts and other federal legislation;

(2) absent the administrative machinery provided in the original act for its protection, the same remedies exist for the protection of that right as were invoked in the *Texas* and *Virginian Railway* cases, *supra,* in the District Courts, under Section 24, amended of the Judicial Code, (28 U. S. C. Section 1337)[1] as well as the additional remedies provided by State Labor Relations Acts and other laws relating to collective bargaining, enacted since the National Labor Relations Act (See *Bethlehem Steel Company* v. *New York State Labor Relations Board, supra*); and

(3) although, *arguendo,* the amended act could validly withdraw the administrative and other remedies of the original act for the protection of that right, (See Point II *infra*) it may not, consistently with the due process requirements of the Fifth Amendment, deprive supervisory employees of all remedies, before the District Courts, the State Labor Relations Boards, or other federal or state

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[1] "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." (See 28 U. S. C. 1940 ed. Sec. 41(8)(23) March 3, 1911, ch. 231, Section 24, Pars. 8, 23, 36 Stat. 1092, 1093; October 22, 1913, ch. 32, 38 Stat. 219; 28 U. S. .C Section 1337, Reviser's Notese p. '838.)

agencies under any law, national or local, relating to collective bargaining, without providing some real opportunity to protect the right.

3. Sections 2(3), 2(11) and 14(a) of the amended act purport to accomplish such a complete deprivation. The court below construed these sections as if, without restricting the fundamental rights of supervisory employees, they merely withdrew the protection of the original act for the enforcement of those rights against private employers (R. 329). Such a construction is not warranted by the plain terms and legislative history of the statute. Section 14(a) provides that "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, *but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors*[2] *as employees for the purpose of any law, national or local, relating to collective bargaining.*" The Board has construed these provisions as removing supervisors from the jurisdiction of the Board (*In the Matter of Westinghouse Electric Corp.*, 75 N. L. R. B. 1, September 30, 1947; Public Announcement W-1, Sept. 10, 1947).[3] Judicial review of such action is not provided by the Administrative Procedure Act. 5 U. S. C. Sections 1001, 1009. Supervisory employees are thus deprived of all opportunity to protect the right administratively before the Board.

Section 14(a), however, does not limit the denial of jurisdiction to the Board. The intention of Congress was to state a "national policy in respect of organization and collective bargaining by foremen." (H. Rep't. 245 on HR 3020 80th Cong., 1st Sess., p. 40). "Section 14. This

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[2] See Section 2(3) and 2(11) of the amended act, App. p. 28.

[3] "The Board dismisses the petitions in the following 59 cases where the petitioners seek certification for a unit of supervisors, since the amendment to the National Labor Relations Act removes supervisors from the definition of employees and, accordingly, from the jurisdiction of the Board. . . ."

is a new section which makes it clear that the amendments to the act do not prohibit supervisors from joining unions, but that it is contrary to national policy for *other Federal or State agencies* to compel employers who are subject to the National Board to treat supervisors as employees for the purpose of collective bargaining or organizational activity." (Sen. Rep't. No. 105 on S. 1126, p. 28, 80th Cong., 1st Sess. italics supplied. See also H. Conf. Rep't. No. 510 on HR 3020, 80th Cong., 1st Sess., p. 60). "Supervisors are management people. . . . *It seems wrong and it is wrong* to subject people of this kind . . . to the levelling processes of seniority, uniformity and standardization that the Supreme Court recognizes as being fundamental principles of unionism (*J. I. Case Co.* v. *National Labor Relations Board* 321 U. S. 332 (1944)). *It is wrong for the foremen,* for it discourages the things in them that made them foremen in the first place. For the same reason, that it discourages those best qualified to get ahead, *it is wrong for industry and particularly for the future strength and productivity of our country* . . . What the bill does is to say . . . that no one, whether employer or employee, need have as his agent one who is obligated to those on the other side or whom for *any* reason he does not trust." (H. Rep't. No. 245 on HR 3020 *ibid* pp. 15-17, italics supplied).

It is apparent, therefore, from the terms and legislative history of Section 14(a) that Congress intended, as a matter of national policy, to withdraw completely all remedies that could be anywhere invoked to protect the rights of supervisory employees to self-organization and collective bargaining, against invasion by private employers.

This conclusion is further supported by the provisions of other sections of the amended act. It is clear that, under the original act, the power of the Board to enforce the rights of employees was paramount and exclusive. *Amalgamated*

Utility Workers v. *Consolidated Edison Co.*, 309 U. S. 261; *Bethlehem Steel Co.* v. *New York State Labor Relations Board, supra.* Cf. Jaffe, "The Public Right Dogma in Labor Board Cases," 59 Harv. L. Rev. 720 (1946). Despite the elimination of the word "exclusive" in Section 10(a) of the amended act, it has been held, as to individuals who are employees within the meaning of the amended act, that the only rights made enforceable by the amended act were those determined by the Board to exist; that the federal district courts were without jurisdiction to redress, by injunction or otherwise, the unfair labor practices which it defined; and that the exclusive jurisdiction of the Board remained unchanged. *Amazon Cotton Mills* v. *Textile Workers Union*, 167 F. 2d 183 (C. C. A. 4th, 1948). Similarly, since the jurisdiction of the National Labor Relations Board under the amended act is still paramount and the intent is clearly expressed in the amended act to deprive supervisors of all remedies under any law, national or local, relating to collective bargaining, it would appear that the amended act also prohibits State Labor Relations Boards or other state agencies, in the exercise of state police power, from affording remedies to supervisors for the invasion of their rights to self-organization and collective bargaining. *Hill* v. *Florida*, 325 U. S. 538; *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605; *Bethlehem Steel Co.* v. *New York State Labor Relations Board, supra.*

It is clear, therefore, from the provisions of Section 10(a) of the amended act and from the grant by Congress of paramount authority to the national Board in the field, that Congress intended no regulation of the rights of supervisors except its own. It is equally clear from the provisions of Sections 2(3), 2(11) and 14(a) of the amended act, that Congress intended, by its regulation, that supervisors are to be deprived of all existing remedies that may

be invoked in any federal agency, including the District Courts, and in any state agency, including the State Labor Relations Boards, to redress employer invasions of their rights.

4. Under these circumstances, we submit, Sections 2(3), 2(11) and 14(a) deny petitioner, and the supervisory employees whom it represents, due process of law in violation of the Fifth Amendment to the Constitution. The right of such employees to self-organization and to select representatives for the purpose of collective bargaining without restraint or coercion are rights which, under the First Amendment, Congress may not abridge or destroy. Existing remedies for the enforcement of these rights were gathered up by Congress under the original act and placed within the paramount jurisdiction of the National Labor Relations Board, which furnished a single, exclusive remedy for their protection. The amended act, without restricting such rights, nevertheless deprived supervisory employees of all opportunity to protect those rights administratively before the Board, (See Note, Primary Jurisdiction—Effect of Administrative Remedies on the Jurisdiction of the Courts, 51 Harv. L. Rev. 125 (1938)) and of all preexisting remedies under any law, national or local, through any agency, federal or state, which would have been available, in the absence of the single, paramount and exclusive national agency of protection. Such a complete deprivation constitutes a denial of due process. "Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it". *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill,* 281 U. S. 673, 682; *Truax* v. *Corrigan* 257 U. S. 312, 330, 332; *Graham* v. *Good-*

cell 282 U. S. 409, 426-443 (citing cases); *Duke Power Co.* v. *So. Carolina Tax Commission* 81 F 2d 513, 517 (C. C. A. 4th, 1936); *Farley* v. *Abbetmeier* 114 F 2d 569, 577 (App. D. C. 1940). Here, under the amended act, supervisory employees are denied due process in its primary sense of an opportunity to be heard by any tribunal in defense of their substantive rights, see *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill, supra,* at p. 678; *Postal Tel. Cable Co.* v. *Newport,* 247 U. S. 464, 476, and also in the sense of access to existing remedies in the district courts and state agencies for judicial or other enforcement of their rights. The court below held that Congress intended by the enactment of the amended act that employers be free in the future to discharge supervisors for joining a union and to interfere with their union activities (R. 333). We submit that such was the intent of Congress. The court below held that such conduct was now lawful (R. 333). We submit that such conduct is lawful only because Congress, in Sections 2(3), 2(11) and 14(a) of the amended act, has unconstitutionally deprived supervisory employees of all remedies for the employer-invasion of their constitutionally protected rights, as guaranteed in Section 7 of the amended act and Section 2 of the Norris LaGuardia Act. Otherwise, such conduct is clearly unlawful. The holding of the court below has not given proper effect to the applicable decisions of this Court in the *Texas, Virginian Railway, Jones & Laughlin, Brinkerhoff-Faris* and *Truax* cases, cited above, on an important constitutional and federal question in the administration of the amended act, and the resolution of that question by this Court is required.

II. SECTIONS 2(3), 2(11) AND 14(a) OF THE AMENDED ACT DENY PETITIONER AND THE SUPERVISORY EMPLOYEES WHOM IT REPRESENTS DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION BECAUSE THOSE

SECTIONS ARE BASED UPON AN ARBITRARY CLASSIFICATION WHICH BEARS NO REASONABLE RELATION TO THE PURPOSES OF THE LEGISLATION.

The court below held that the action of Congress in deciding as a matter of policy that in the enforcement of the National Labor Relations Act supervisory employees must be treated either as a part of management or as a part of the employees, and in treating them as a part of management, was based upon substantial and real considerations and was not an arbitrary or unjustifiable classification (R. 331). The court did not consider in its opinion the discrimination effectuated by the amended act among the following classes, all of whom have equal rights or who are, as employees, similarly situated:

1. Plant guards (Section 9(b)) and professional employees (Sections 2(12) and 9(b) of the amended act) are granted the protection of the amended act, while supervisors are denied it. But the former groups represent the interests of management no less than the latter and both are equally adverse to other employees. "In guarding the plant and personnel against physical danger, they (plant guards) represent the management's legitimate interest in plant protection. But that function is not necessarily inconsistent with organizing and bargaining with the employer on matters affecting their own wages, hours and working conditions. As in the case of foremen, we see no basis in the Act whatever for denying plant guards the benefits of the statute when they take collective action to protect their collective interests. . . ." *National Labor Relations Board* v. *E. C. Atkins & Co.*, 67 S. Ct. 1265, 91 L. Ed. 1157, 1161. The amended act itself defines a guard as "any individual employed . . . to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." (Section 9(b)). And professional employees, such as time-

study personnel and time keepers, represent management's interests because they "help to fix the pace at which employees work and to determine the number of men the work calls for" (H. Rep't. No. 245, pp. 16-17). *In the Matter of Worthington Pump and Machinery Co. and Time Study and Motion Association*, Case No. 1 C 2874, 75 N. L. R. B. 678 decided January 2, 1948; *Art Metal Construction Company*, 75 N. L. R. B. No. 11. See also *Lumbermen's Mutual Casualty Co.*, 75 N. L. R. B. No. 129 (attorneys employed in claim department of insurance company held professional employees entitled to the protection of the amended act.)

As this Court has pointed out, in the *Packard* and *Atkins* cases *supra*, guards and supervisors both have independent, adverse and legitimate interests of their own, as employees, to protect in their dealings with the employer. Nevertheless, the amended act discriminatorily grants protection to guards and professional employees while denying that protection to similarly situated supervisors.

2. While supervisory employees are regarded as part of management and denied the protection of the amended act in their right to select representatives for the purposes of collective bargaining, management itself is granted the protection of the amended act in that right (Sections 8(b)(1)(B); 8(b) (2)-(6)), as are non-supervisory employees generally (Sections 8(a)(1)-(5)). The purported distinction between non-supervisory employees and supervisors who are in fact employees is based on the fallacious approach which elevates supervisors to the status of officers of the Company representing the stockholders and directors, not for the purpose of giving them the economic benefits of such officers, but for the sole and conceded purpose of denying them the rights as employees. (See *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U. S. 490). The distinction between management itself which is pro-

tected by the amended act and supervisors who by legislative fiat are made a part of management but denied the protection of the amended act, is a discrimination which enables management to command the time and abilities of supervisors with inadequate compensation and rests on no legitimate basis which would otherwise justify the classification.

3. Supervisors employed by employers subject to the amended act are denied the protection of the act while other supervisors subject to the Railway and Carriers by Air Labor Act (45 U. S. C. A. 151, Fifth, 151(a), First through Tenth) are protected in such rights, although as supervisors the status of both is identical. The only differences are that Congress has taken jurisdiction over different types of employers and that railway labor organizations are strong whereas supervisors' organizations in non-railroad industries are not.

4. The distinction between supervisors under the amended act, on the one hand, and employers, employees, plant guards and professional employees under the amended act, and supervisors under other federal legislation, on the other hand, goes deeper than a classification based on status, and discriminates between the two groups with respect to remedy. The second group is protected by the administrative machinery of federal legislation, and, in the case of supervisors subject to the Railway and Carriers by Air Labor Act, by access to the District Courts and by the penal provisions of 45 U. S. C. A. 152 Tenth. Supervisors under the amended act are denied not only the protection of the federal administrative agency, but all remedies that may be anywhere invoked for the protection of the self-same rights. (See Point I, *supra*). Such discrimination, moreover, is contrary to the purposes of the amended act. The denial of the right of supervisors to organize, which occurred during the

years of "inaction, vacillation and division" of the Board, under the original act (See *Packard Motor Car Co.* v. *National Labor Relations Board, supra*), has led, as the Board has found, to an increase in industrial strife, *Matter of Packard Motor Car Company*, 61 N. L. R. B. 4, Tenth Annual Report of National Labor Relations Board, p. 31. The purpose of the amended as well as the original act is to decrease industrial strife (Section 1 of the original, Section 1 and 101 of the amended act). The evidence cited by the framers of the amendment that the organization of foremen has led to an increase in industrial strife is limited to an isolated instance and is contrary not only to the general experience which led to all prior federal legislation in the field but to the great weight of specific evidence with respect to supervisors under the original act. (See H. Rep't No. 245 on HR 3020, *supra*, at p. 14; Section 1 of the amended act App. p. 27.)

The court below, without adverting to the foregoing instances of discrimination, relied on classifications in the original act, which exempted agricultural, domestic employees, and individuals employed by parent or spouse from the coverage of the original and amended acts, and the exemption of other classes of employees from the coverage of federal wage and hour, social security, and workmen's compensation acts (R. 330-331). But the exemptions from the original act were based on the theory that the exempted employees were employed by intra-state employers, whose controversies were of purely local significance (S. Rep't No. 573, to accompany S. 1958 74th Cong., 1st Sess., p. 7; H. Rep't No. 972, on S 1958) 74th Cong. 1st Sess., pp. 8-9) and the exempted employees were not denied remedies under any law, national or local relating to collective bargaining, as are supervisors here. The exemption of other employees from the coverage of other acts relates to rights of an entirely different nature from the constitutional and

preferred rights safeguarded by the original act. Employees have no constitutional right to be included in a social security system, or to minimum hours and minimum wages, to be fixed by an administrative tribunal or to a federal workmen's compensation system. Employees do have a constitutional right to self-organization, for which *all* protection may not be denied (See Point I, *supra*).

Thus, the classification between supervisors, under the amended act, on the one hand, and others similarly situated, on the other hand, is discriminatory, based on no justifiable distinctions, bears no reasonable relation to the purposes of the legislation, and is injurious to supervisors since it places them beyond the only machinery, both national and local, available for the peaceful settlement of industrial disputes and forces them either to relinquish their constitutional rights or to resort to self-help and industrial warfare to secure them.

It is well recognized that discrimination may be of such an injurious and arbitrary character as to bring into operation the due process clause of the Fifth Amendment. *Nichols* v. *Coolidge,* 274 U. S. 531; *Minski* v. *United States,* 131 F. 2d 614 (C. C. A. 6th, cert. denied 319 U. S. 775, ruling aff'd, 319 U. S. 463); *Currin* v. *Wallace,* 306 U. S. 1, 14; *Barbier* v. *Connally,* 113 U. S. 27. Here, the discrimination between supervisors under the amended act, on the one hand, and employers and employees under the amended act and supervisors under other federal legislation, on the other hand, falls within the constitutional ban. Even if contrary to our contention in Point I the amended act does not withdraw from supervisors all remedy for employer invasion of their rights, but merely remedies before national and local administrative agencies, the due process clause requires equality of treatment in this respect, as much as in the respect that every man shall have the benefit of his day

in court and the benefit of the general law, *Truax* v. *Corrigan*, 257 U. S. 312, 330, 332 and cases cited.

The *Truax* case, *supra*, raises, and we submit, correctly decides in petitioner's favor, the legal issues under both of the foregoing Points. In that case, this Court held invalid, under the due process and equal protection clauses of the Fourteenth Amendment, an Arizona statute which forbade the state courts to issue injunctions against picketing in labor disputes by means which this Court termed illegal, although non-violent. The grounds were first, that the statute denied all remedies for the protection of a property right of the employer picketed, when the state could not constitutionally destroy that right,[4] (see Point I, *supra*), and second, even if the statute forbade only injunctive relief, it discriminated against such an employer, by withholding access to the courts for injunctive relief for him which was available to others for the protection of the same right.[5] (See Point II, *supra*). The principle of the *Truax* case is applicable to the case at bar, even though the means which this Court there held illegal may now be interpreted otherwise.

In the case at bar, the findings and admissions on which Sections 1(a), 1(b) and 2(c) of the Board's Order rest include the following:

> "Robert Erwood, Director of Personnel and Plant Manager Walton told them (three foremen) 'you either got to resign as officers of the Union or resign from the

[4] "To give operation to a statute whereby serious losses inflicted by such unlawful means are, in effect made, remediless, is we think to disregard fundamental rights of liberty and property and to deprive the person suffering the loss of due process of law" (*ibid* at p. 330).

[5] "Here is a direct invasion of the ordinary and business rights of a person, unlawful when committed by anyone, and remediable because of its otherwise irreparable character by equitable process, except when committed by ex-employees of the injured person. If this is not a denial of the equal protection of the laws" (and hence the spirit of equality embodied in the due process clause), "then it is hard to conceive what would be" (*ibid*, 335, 331).

> Company' . . . 'You fellows cannot belong to it (the Union) and work for Budd.' They were requested to stop all organizational activity . . . they finally informed . . . Erwood they would resign from office. Later they did so and notified Erwood accordingly.
>
> "Subsequently, all foremen . . . were also told that they did not need a union, that respondent did not want them to belong to a union and that respondent was opposed to a union of foremen (R. 34-35).
>
> "In its answer, respondent 'admits that it laid him (Owens) off and refused to reemploy him and alleges the reason to be that he attempted to organize members of the Company's supervision into a labor organization and that when warned that continuation of such action would result in his being laid off, he agreed to discontinue such activities, but failed to do so, whereupon he was laid off' " (R. 38, 54).

But for the provisions of the amended act here challenged, this conduct would clearly be illegal.

The contrary decision of the court below has thus not given proper effect to applicable decisions of this Court on an important question relating to the application and construction of the Constitution and federal statutes, which has not been but should be settled by this Court.

Conclusion

The court below refused to enforce the order of cessation of unfair labor practices in Section 1(a), 1(b) and the correlative notice provisions of 2(c) of the Board's Order of January 30, 1946, as enforced in its prior decree of June 3, 1947, because "We believe that Congress intended by the enactment of the Labor Management Relations Act that employers be free in the future to discharge supervisors for joining a union and to interfere with their union activities. The cease and desist provisions of the Board's Order would enjoin the respondent from engaging in conduct in the future which is now lawful. They should, accordingly, be

set aside" (R. 333). But such employer invasions of the constitutional rights of supervisors are lawful only because the amended act in Sections 2(3), 2(11) and 14(a) purports to deny all remedies national or local, under any law relating to collective bargaining for the protection of those rights, in contravention of the due process clause of the Fifth Amendment (See Point I, *supra*), and because the amended act in those sections so injuriously discriminates against supervisors employed by employers subject to the amended act, as to fall athwart the equal treatment requirement of the due process clause of the Fifth Amendment (Point II, *supra*). Otherwise such violations are clearly unlawful.

These sections of the amended act are, therefore, unconstitutional and are no barrier to the enforcement of the order of the Board under the original act as originally enforced by the court below in its decree of June 3, 1947. *Davis* v. *Wallace*, 257 U. S. 478; *Eberle* v. *Michigan*, 232 U. S. 700; 11 *American Jurisprudence*, 841; *Packard Motor Car Co.*, v. *National Labor Relations Board, supra.*

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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APPENDIX

Statutes Involved

National Labor Relations Act of 1935 (July 5, 1935, C. 372, Sec. 7, 49 Stat. 449, 452, 29 U. S. C. 157)

"Sec. 157. *Right of employees as to organization, collective bargaining, etc.*

"Employees shall have the right to self-organization, to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection. July 5, 1935, c. 372, Sec. 7, 49 Stat. 452."

Labor Management Relations Act, 1947 (Public Law 101, 80th Cong., Ch. 120 1st Sess. 29 U. S. C. 151 et seq.)

"SHORT TITLE AND DECLARATION OF POLICY

"Section 1. (a) This Act may be cited as the 'Labor Management Relations Act, 1947.'

"(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety or interest.

"It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which

affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

"Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

" 'FINDINGS AND POLICIES

" 'Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce . . ."

" 'The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

" 'Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees."

" 'It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation

of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.''

'' 'DEFINITIONS

'' 'Sec. 2. When used in this Act—

'' '(3) The term ''employee'' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.''

'' '(11) The term ''supervisor'' means any individual having authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.''

'' 'RIGHTS OF EMPLOYEES

'' 'Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such

right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

" 'PREVENTION OF UNFAIR LABOR PRACTICES

" 'Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

" 'Sec. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purposes of any law, either national or local, relating to collective bargaining."

Norris LaGuardia Act. (Public No. 65, 72nd Cong. 29 U. S. C. 102)

"Sec. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property or organized in the corporate and other forms of ownership association, the individual unorganized worker

is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted."

Judicial Code, Section 24 amended (28 U. S. C. (1948 ed.) 1337)

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies," 28 U. S. C. 1940 ed. Section 41 (8) (23) (March 3, 1911, ch. 231, Section 24, Pars. 8, 23, 36 Stat. 1092, 1093; Oct. 22, 1913, ch. 32, 38 Stat. 219; 28 U. S. C. Section 1337, Reviser's Notes p. 1838.)